

September 22, 2009

Mr. Matt Hale  
Director  
Office of Resource Conservation and Recovery  
U.S. EPA  
Ariel Rios Building  
1200 Pennsylvania Avenue, NW (MC: 5301P)  
Washington, DC 20460

Dear Matt:

The Program Operations Task Force (Task Force) of the Hazardous Waste Subcommittee of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) appreciates the opportunity to provide comments on EPA's proposal to establish certain regulatory authorities concerning financial responsibility requirements.

These comments were prepared as a result of Jim Berlow's presentation to the ASTSWMO Hazardous Waste Subcommittee meeting on August 12, 2009 in Washington, D.C. Mr. Berlow discussed the Federal Register notice published on July 28, 2009, which stated, "Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, establishes certain regulatory authorities concerning financial responsibility requirements. Specifically, the statutory language addresses the promulgation of regulations that require classes of facilities to establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances. CERCLA Section 108(b) also requires the U. S. Environmental Protection Agency (EPA) to publish a notice of the classes for which financial responsibility requirements will be first developed. To fulfill this requirement, EPA is by this notice identifying classes of facilities within the hard rock mining industry for which the Agency will first develop financial responsibility requirements under CERCLA Section 108(b). For purposes of this notice, hard rock mining facilities include those which extract, beneficiate or process metals (*e.g.*, copper, gold, iron, lead, magnesium, molybdenum, silver, uranium, and zinc) and non-metallic, non-fuel minerals (*e.g.*, asbestos, gypsum, phosphate rock, and sulfur)."

As a result of Mr. Berlow's presentation, the Task Force asked the ASTSWMO membership, which is comprised of the 50 States, District of Columbia and the five Territories (States) to comment on EPA's proposal to institute financial assurance obligations for certain facility classes. Specifically, the States were asked to assist in identifying and prioritizing which classes of facilities, including and in addition to those listed, should be examined for possible financial assurance requirements. Please note that due to the short timeframe for providing feedback, responses were obtained from eleven States and Territories.

The following are the consolidated comments from member States. The comments have not been reviewed or adopted by the ASTSWMO Board of Directors.

Respectfully,

A handwritten signature in black ink that reads "Robert Haggerty" followed by a stylized flourish that appears to be "DCC".

Robert Haggerty, Chair  
ASTSWMO, Hazardous Waste Program Operations Task Force

cc: Jim Berlow, EPA ORCR  
ASTSWMO HW Subcommittee and Task Forces

## **Priority Ranking of Facilities that Should be Examined for Possible Financial Assurance Requirements**

The following facility classes were nominated by multiple States, and are listed in descending order of nominations:

- recyclers
- wood treatment facilities
- some or all hazardous waste generators

The following facility classes received only one State nomination each and are listed in no particular order:

- large quantity hazardous waste generators
- chemical manufacturers
- metal platers and finishers
- dry cleaners
- solid waste landfills
- universal waste facilities
- used oil processing sites
- waste water treatment units

In addition to the above ranking of facility classes, many comments about EPA's proposal were also received. These comments have been grouped below by general subject area. In some cases, similar comments were combined into one comment.

### **Financial Assurance for Generators**

When one regulates generators for financial requirements you provide an incentive to not become a generator and minimize waste in order to stay as a small quantity generator or to not generate any waste at all. States understand the need to require financial responsibility for hard rock mining operations. However, expanding these requirements to hazardous waste generators is fraught with problems.

It should be recognized that hazardous waste generators are not a static business universe and therefore will be very difficult to regulate. For example, large quantity generators (LQGs), which are a sub-set of the generator category, are required to submit hazardous waste annual reports in our state, so we have a better handle on them than other generators. Over a 3 year span (2005 - 2007), less than 20% of all the LQGs submitted reports for all three years. This shows that there is a great deal of fluctuation in the LQG universe and the total generator universe is many, many times larger. This is an enormous universe and EPA should consider how they intend to regulate it given the lack of resources.

Financial assurance for generators is a challenging issue. While we understand the legal pressures for implementing financial assurance requirements, it is unclear whether the benefits achieved would offset the significant resources that would be required. Implementing full financial

assurance obligations for these facilities is not a reasonable course of action at this time. A simplified version of financial assurance could be instituted for generators, similar to current requirements for underground petroleum tanks or RCRA liability coverage. Standardized forms with flat rates would ensure at least partial coverage of closure costs and would simplify the review process. This would greatly reduce the amount of resources that would be necessary to implement financial assurance requirements for generators.

### **Program Implementation Issues**

Several States questioned what, if any, part of the new financial assurance requirements would be required to be implemented by authorized programs. Many States commented that the review and approval of these documents will be extremely time consuming and will require substantial resources, which the States do not have.

Some States have already adopted financial assurance requirements for some of the proposed groups. These requirements currently mirror RCRA requirements. If EPA were to adopt separate financial assurance requirements through a mechanism other than RCRA, would these facilities be required to provide double coverage?

If EPA is not planning to incorporate the new financial assurance requirements into RCRA, but instead incorporate them in CERCLA, would the States be required to incorporate similar changes into their state superfund programs?

Prioritizing the given types of facilities should balance risk mitigated, resources required, and benefit achieved. Implementation of financial responsibility for the listed industries will require significant rule revisions and will be controversial. This should be given extra consideration, especially given the current economic climate.

EPA should define the categories of facilities fairly narrowly and concentrate on the facilities that are of a type that have had a history of needing government-funded removal actions or other responses to facility abandonment. If a category is too broadly defined, a lot of facilities that are not causing a problem will have a costly burden imposed on them without there being an associated benefit (not to mention the additional government resources that will be needed to evaluate the financial assurance documentation, with little benefit accruing for the effort.) One State would be against imposing the requirement on as broad a category as "hazardous waste generators" but the ultimate decision on what categories will be required to meet a financial assurance requirement must be based on a clearly demonstrated benefit exceeding the burden imposed.

### **Education of Businesses**

One State's experience implementing financial assurance for hazardous waste recyclers was that significant guidance provided up-front was very helpful. Although they spent considerable resources developing templates, creating standardized forms, and conducting workshops, the State found these steps were very helpful to firms in assisting them in complying with the new financial assurance regulations. They recommend that any implementation plan developed by EPA

include similar steps at the beginning, to assist businesses in complying with new regulations. Technology such as web-based forms can be a cost-effective way to help ease regulatory burdens. It is recommend that any implementation plan developed by EPA include steps to educate businesses as to the underlying reasons for financial assurance (and not just that it is required because a court said so), the benefits financial assurance can provide to a business, and how financial assurance protects taxpayers.

Financial responsibility requirements are complex. Many States do not have enough staff with expertise to adequately review financial responsibility mechanisms and it will be difficult for the regulated industry, many of whom are small businesses, to understand and comply with the regulations.